

# Enduring powers of attorney and wardship



**Doctors should view affidavits in the same way as giving evidence in Court under oath. They could in the future be questioned on the truth of the affidavit, writes Liam Heffernan**

A GP MAY ENCOUNTER REQUESTS from patients, families and solicitors in respect of both ‘enduring powers of attorney’ (EPA) and ‘wardship’. Both concepts relate to capacity issues of a patient. Frequently queries arise when a GP is asked to become involved in either process.

It is important to be aware that at the time of writing the Assisted Decision-Making and Capacity Act 2015 which introduces changes to the current mechanisms, has been passed but is not yet fully operative.

## Enduring powers of attorney

An EPA is a legal document allowing a person (known as the donor), with full capacity the opportunity to plan for their future. The donor nominates a person (who will be called ‘attorney’) to take control of the donor’s assets in the event that the donor loses capacity. The control assigned to the attorney can also include (or can be limited to) personal care decisions. This can lead to confusion as to the extent of authority that the attorney has in the donor’s affairs.

An EPA, depending on drafting, may allow the attorney to make decisions regarding a donor’s personal care, for example, the people the donor sees, their day-to-day diet, where the donor lives and may assist with housing, social welfare and any other benefits.

Under current legislation, personal care decisions under an EPA do not include healthcare or end of life decisions but this is set to change when the relevant provisions of the Assisted Decision-Making and Capacity Act 2015 come fully into effect.

We regularly see scenarios in a GP setting where, for example, an elderly patient has executed an EPA, nominating an adult child. The nominated person may insist that their consent is obtained before a medical treatment is provided to their parent. This has arisen recently in the context of Covid-19 vaccines.

This can lead to confusion when a family member is under the misapprehension that they have the power to consent to or refuse medical treatment of behalf of a patient who has lost capacity. However, at present, attorneys do not have the authority to refuse or provide consent to medical treatment.

## The doctor’s role in the EPA process

Doctors are called upon to certify capacity at two stages:

- When the donor signs the EPA in the first instance, nominating their attorney. A doctor will be asked to complete a certificate to prove the patient has capacity to execute an EPA. While the donor’s solicitor is required to discuss the EPA and its consequences with the donor, a doctor should explain the consequences of the transfer of the donor’s personal care decisions to the attorney at an appointment.
- When the donor loses (or is about to lose) their mental capacity: The EPA only comes into effect once the donor loses capacity and it is registered with the registrar of the Wards of Court Office. The patient’s solicitor must take certain steps to register the EPA at the point in time when the donor loses capacity, or if they are starting to lose capacity. The patient’s solicitor will send the doctor a form to certify that the donor is or where appropriate, is becoming, incapable by reason of a mental condition, of managing and administering their own property and affairs. This must include specific information regarding the examination that has taken place by the doctor. It also acts as a safety net whereby the doctor has an opportunity to object to the registration of the EPA with the High Court within five weeks, if they believe the patient does have capacity.

If a doctor considers it beyond their expertise to assess a patient’s capacity, they can consider referring the patient to an appropriate specialist.

## Wardship

We also frequently receive queries where a doctor receives a request, usually from a solicitor, to assist in an application for wardship in respect of a patient. It usually involves a request to swear an affidavit or provide a medical report in respect of the patient’s capacity.

Where a patient does not have an EPA in place, and they become unable to manage their assets because of mental incapacity, an application may be made to the Court for them to become a ward of Court.

The application is usually made by a family member (a 'petitioner'), with the assistance of a solicitor. It must include the opinion of two doctors, one of whom is often the patient's GP. The president of the High Court decides whether to conduct an inquiry into the proposed ward's capacity and if so, the proposed ward is examined by a Court-appointed doctor.

The Court must then decide whether the person is capable of managing his or her own property and in order to reach that decision it must be satisfied the person is of 'unsound mind'. If so, the person is made a ward of court and a 'committee' (usually a family member) is appointed to control assets on the ward's behalf.

#### The doctor's role in wardship applications

Doctors generally become involved if they receive a request from a petitioner's solicitor asking them to swear an affidavit or to provide a medical report, which will be appended to an affidavit, regarding the patient's capacity. This will be used to support a wardship application.

If the doctor concludes it is in the patient's best interests to proceed, they should conduct an assessment for the purposes of the application, within three months of the presentation of the petition.

The doctor should explain the purpose and consequences of the assessment to the patient, including the fact that their information will be disclosed to the solicitor and obtain their consent to proceed. If the doctor believes the patient has capacity and the patient does not consent, then the doctor should not proceed.

If the patient lacks capacity to consent to the process, the doctor should consider whether a wardship application is in the patient's best interests. As the affidavit required to support a wardship application is a sworn document required by the president of the High Court, it would be assumed that this step is in the patient's best interests and required by the High Court in order to grant the order to make the patient a

ward of court. Ultimately it will be a decision for the Court as to the outcome of the application. Doctors should take detailed notes of their decision-making process. If the circumstances are such that a doctor considers it beyond their expertise to assess a patient's capacity, they can consider referring the patient to an appropriate specialist.

Certain information must be included by the doctor, specifically whether or not, in their professional opinion, the proposed ward is of unsound mind and incapable of managing their affairs.

Doctors should view affidavits in the same way as if they were giving evidence in Court under oath and realise that they could in the future be questioned on the truth of the affidavit. Doctors must ensure that they are satisfied with the wording of the affidavit and not feel intimidated or pressurised into swearing one. When a doctor is happy with the content of the affidavit, they must sign it in front of a commissioner for oaths or practising solicitor.

#### Healthcare decisions on behalf of a ward of Court

Where an adult has been made a ward of court, the president of the High Court has authority to make decisions on consent to medical treatment. After obtaining medical advice, medical treatment matters should be referred by the Committee of the ward or by the clinical director of the relevant hospital to the registrar of the Wards of Court Office. In practice, the registrar has delegated authority from the president of the High Court to consent to the carrying out of routine and non-controversial procedures in consultation with the person's next of kin.

We frequently receive queries about both EPAs and the wardship process, and sometimes issues can arise in the context of a broader family dispute. If you require any further information, please contact your indemnifier for advice. 

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## Call for Mentees for ICGP Mentorship Pilot

The ICGP is running a pilot GP Mentorship Programme. The aim of this is to evaluate the need and demand for such a programme, which would be open to all members.

An initial panel of mentors has been drawn up. The pilot will run for 12 months and will allow feedback from mentees to assess the programme. Members who would like to be Mentees in the programme should indicate their interest by email at [mentorship@icgp.ie](mailto:mentorship@icgp.ie). All mentee requests are treated confidentially.

If you wish to discuss the above informally before indicating your interest, please Email: [mentorship@icgp.ie](mailto:mentorship@icgp.ie)

Information on the programme is available on [www.icgp.ie](http://www.icgp.ie)

